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NUMBER_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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FRANK R. SARGENT,
Petitioner,

vs.

MARSHALL S. MAYER,
Respondent.

++++++++++++

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

++++++++++++

FRANK R. SARGENT
Petitioner, pro se
41 B Street
Laurel, Maryland 20707
(301) 497-2742)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the standard of care in Professional Malpractice cases is determined by geographical boundaries.

2. Whether Plaintiff in Professional Malpractice action can prove his case with the testimony of Defendant.

3. Whether Trial Court's contradictory rulings on evidence and it's misstatement of factual matters in Judgement Memorandum sufficiently prejudiced the Petitioner to warrant the intervention of this Court.

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OPINION BELOW

The Order of the United States Court of Appeals for the Ninth Circuit was filed on or about February 26, 1982 in an unreported Memorandum. A copy of Memorandum is attached hereto as Appendix A. On or about April 20, 1982 the Court additionally denied Petitioners Motion for Rehearing and rejected Petitioners Suggestion for a rehearing En Banc. A copy of Order is attached hereto as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

This request for review arises from judgement against the petitioner in a legal malpractice action brought in the Federal District Court for Eastern California. Jurisdiction in that Court was based on diversity of citizenship between parties.

Because of the nature of the case certain information in the background of the underlying case is essential for proper understanding of issues sought to be reviewed.

In 1973 petitioner suffered a fire loss that resulted in an action against an insurance company in the Superior Court of San Francisco. The insurance company alleged certain 'contract defenses' in it's answer to that action. Subsequentally, in July of 1974 the insurance company filed an interpleader action in Shasta County Superior Court naming petitioner as one of several defendants. The interpleader action was for the alleged purpose of distributing insurance proceeds due and payable only to mortgage holders. Petitioner never made any claims to any part of the interpled funds. Petitioner retained herein respondent as legal counsel to represent him in the interpleader action and shortly thereafter respondent Mayer advised petitioner Sargent, by letter, that a stipulation by parties and the Shasta Court had been entered into whereby the aforementioned 'contract issues', joined for litigation in the San Francisco action, would not be litigated in the Shasta case. (A copy of said letter is attached hereto as Appendix D).

A judgement issued in the Shasta Court whereby the 'contract issues' were fully litigated and petitioner was nonsuited as to all claims against the insurance company.

Respondent Mayer advised petitioner that there was nothing appealable in the Shasta judgement and his service was terminated. Petitioner, financially unable at the time to retain other counsel, pursued an appeal 'pro se' to the California Fourth District Court of Appeal where, on July 27, 1979 an Order issued reversing the Shasta judgement on the grounds that it was improper to litigate 'contract issues' within the context of an interpleader proceeding.

On February 2, 1978 the petitioner, a Maryland resident, filed the action below in the Federal District Court for Eastern California, the Honorable Milton J. Schwartz presiding, alleging in the complaint Professional Malpractice and Fraud against the respondent and specifically alleging him to failed to keep his client properly informed as to issues involved in the litigation; informing his client that the 'contract issues' in the San Francisco case were protected when they were not; misinforming his client of the correct trial date (twice) and thereby prevented the appearance of important witnesses; and the central issue, that he had allowed his client to be subjected to years of unnecessary and expensive litigation that he could have aborted at any time before trial.

The case went to trial on October 7, 1980 before Judge Schwartz and a jury was empaneled at the morning session. Prior to commencement of trial petitioner submitted the deposition of his proposed expert witness, Gerald Kunes, a Maryland practicing attorney for twenty-five years.(The deposition had been taken "de bene esse" because the trial date had been reset three times and it was uncertain if the witness could be available when ultimately needed). The Court rejected the deposition on the grounds that it did not demonstrate that the witness was sufficiently familar with the underlying case and the standard of care involved therein. The Court made no mention of the fact that Mr. Kunes was a Maryland attorney. The petitioner as the plaintiff began his case by taking the stand for a short time to bring documents into evidence and he then called the respondent as defendant and adverse party as witness for the plaintiff. Preliminary matters had consumed all of October 7 and most of October 8. It was the afternoon session of the 8th when Mr. Mayer was called to the stand to testify. On the morning of October 9, pursuant to a motion by the defense, plaintiff's case was interrupted for the purpose of the

defendant's expert witness, Robert Sherwood, being allowed to testify out of turn and during the plaintiffs case solely as an accomodation to the witness. Mr. Sherwood revealed himself to be knowledgable, articulate and of the highest integrity.therefore, after a short period of testimony for the defense he was cross-examined by the petitioner for the rest of the day and the entire day of October 10.

On October 10 the Court ordered a recess in the trial for ten days until October 20 in order to schedule hearings on pending criminal matters that "could not wait". The trial resumed on October 20 and plaintiff's expert witness, Gerald Kunes, was submitted to voir dire examination by the Court and counsel.The Court refused to qualif the witness, after acknowledging him to be a "skilled and competent attorney", on the grounds, as stated by the Court, " When I say "sufficient familiarity", I mean sufficient familiarity with the standard of care in the Shasta County area during 1974 to 1976. Before you can express a professional expert opinion, you have to establish that familiarity."(Reporters Transcript 32:17). The Court then informed the plaintiff that "in the opinion of the Court" the issues were so fundamental as to not require expert testimony for their proof.(R,T. 27:3).

At this point the petitioner formally motioned the Court for an order that Mr. Mayer and Mr. Sherwood be deemed expert witnesses for the plaintiff's case. The Court granted the motion.(R.T. 29:5 and 30:15-25).The Court instructed petitioner to proceed with his case, whereupon, the examination of Mr. Mayer was completed and the petitioner took the stand again to give evidence on damages. He then rested his case, the only witnesses to have testified being the plaintiff, Mr. Mayer the defendant and Mr. Sherwood. The testimony on cross-examination of Mr. Sherwood consumed two full days and that of Mr. Mayer one day.

The defense moved for a Directed Verdict on the grounds that no expert testimony had been offered tending to prove the defendant to have failed to meet the standard of care and that his actions had damaged the plaintiff. The Court granted the defendant's motion. The Court made no written findings pursuant to judgement, however, it issued a Memorandum and Order in ruling on petitioners Motion for New Trial.(A copy of said Memorandum and Order is attached hereto as Appendix C.).

REASONS FOR GRANTING THE WRIT

FIRST QUESTION

THE MINIMUM STANDARD OF CARE IN PROFESSIONAL MALPRACTICE ACTIONS IS NOT SUBJECT TO DIFFERENT INTREPRETATIONS BASED ON GEOGRAPHICAL LOCATION OF PRACTICE.

The trial court disqualified petitioner proffered expert witness, an attorney of twenty-five years practice in Maryland and other jurisdictions, on the grounds,(The Court)" I CANNOT PERMIT A WITNESS WHO DOES NOT HAVE SPECIALIZED TRAINING AND EXPERIENCE WITH CALIFORNIA LAW AND PROCEDURE TO EXPRESS AN OPINION OF THE PROPRIETY OF THE DEFENDANT'S CONDUCT"(R.T.28:21) and,"WHEN I SAY 'SUFFICIENT FAMILIARITY' I MEAN ALSO SUFFICIENT FAMILIARITY WITH THE STANDARD OF CARE IN SHASTA COUNTY AREA DURING 1974 TO 1976. BEFORE YOU CAN EXPRESS A PROFESSIONAL EXPERT OPINION, YOU HAVE TO ESTABLISH THAT FAMILIARITY. THAT WAS THE ONLY REASON FOR MY---AND PURELY A TECHNICAL ONE--- FOR REFUSING TO QUALIFY HIM TO EXPRESS THAT OPINION"(R.T. 32:19).

The ruling of the trial court was improper in the light of controlling law (infra) and the Ninth Circuit Court of Appeals' refusal to address the issue and reverse the trial court places the circuit court in conflict with state courts in other juris-

dictions as well as the FIFTH CIRCUIT COURT OF APPEALS in GLEASON VS. TITLE GUARANTEE CO. (300 F.2d 813, 814 (5th Cir. 1962) rehearing denied 317 F.2d 56 (5th Cir. 1963).

To address the question within the context of the case at bar the reviewing court should recognize that the central issues in the trial court were that respondent failed in his duty to keep his client properly informed as to issues involved and that he allowed his client to be subjected to years of unnecessary and expensive litigation in an improper legal action that could have been terminated at any stage of the proceedings before trial and judgement by implementing available procedures. Specifically, the respondent was charged with failure to properly prepare and timely file discovery pleadings; that he, by letters, misinformed his client as to issues to be litigated; that he misinformed his client as to the seriousness and danger of the litigation; that he (twice) misinformed his client of the true trial date and thereby prevented the appearance of important witnesses; and, that he advised his client to not oppose a foreclosure that resulted in the loss of his client's business property. (Letters attached as Appendix D).

It was also charged that respondent informed his client that his case against an insurance company was fully protected in the proceedings when in fact it was in grave jeopardy and that, at time of trial and without the knowledge or consent of his client, the respondent waived a stipulation designed specifically for the protection of his clients rights.

The trial court's ruling gives rise to a presumption that local custom or practice may allow for a lower standard of care than is generally recognized by the profession. Such a presumption is without foundation, as pointed out in the Fifth Circuit case GLEASON (supra) where the court reasoned that local practices may enlighten the court as to local customs but cannot be used to lower the standard of care. RESTATEMENT, SECOND, TORTS § 295 A. CUSTOM, addresses the issue and suggests that the "reasonable man" standard should apply. Another presumption would be that a different kind of law (or medicine, or engineering, etc.) is practiced in each local area. Law, like medicine, is taught and practiced fundamentally the same in every area of the country. The only difference would be, in law, perhaps a different app-

roach to local rules and procedure, and a knowledge of these local vagaries may be gained quite easily by conscientious experts. The basic standard would be entirely unaffected. Modern trends are to eleminate any reference to geographical confines as a measure of the standard of care. The State of New Hampshire has, by statute, abrogated local deviations, as follows:

> N.H.REV. STAT. ANN.§ 508.13(1975 Supp.) PROFESSIONAL MALPRACTICE; EVIDENCE.
>
> IN DETERMINING WHETHER THE PERSON AGAINST WHOM A MALPRACTICE CLAIM HAS BEEN MADE HAS MET THE APPLICABLE STANDARD OF CARE, THE JURY OR JUDGE SHALL NOT BE BOUND BY THE STANDARD OF CARE ACCEPTED OR ESTABLISHED WITH RESPECT TO ANY PARTICULAR GEOGRAPHICAL AREA OR LOCALITY, BUT SHALL CONSIDER ONLY WHETHER THE PERSON AGAINST WHOM THE CLAIM HAS BEEN MADE HAS ACTED WITH DUE CARE HAVING IN MIND THE STANDARDS AND RECOMENDED PRACTICES AND PROCEDURES OF HIS PROFESSION, AND THE TRAINING, EXPERIENCE AND PROFESSIONAL DEGREE OF SKILL OF THE AVERAGE PRACTICIONER OF SUCH PROFESSION, AND ALL OTHER RELEVANT CIRCUMSTANCES.

Case law in support of uniform stand-

ards of care is supported by BERMAN VS. RUBIN (227 S.E.2d. 802), CARBONE VS. WARBURTON (1953)(11 N.J. 418), HOLMGREN VS. MASSEY FERGUSON INC. (1975)(516 F.2d. 856), TRANSAMERICAN INS. VS. KEOWYN(451 F. SUPP. 397) and STEWART VS. SBARRO (142 N.J.S.C. 581).

Authority for "same or similar locality" is mere dicta.Respondent herein cited SMITH VS. LEWIS (1975)(47 C.A.3d 802)on the issue at trial, however, in SMITH "locality" was not at issue and the reference was only surplusage unnecessarily included in a jury instruction.

The dictum "same or similar locality", however,appears as a liberal latitude when compared to the court's limitations imposed in this case. While the Court mentioned the State of California it emphatically laid down " sufficient familiarity with the standard of care in the Shasta County area during 1974 to 1976"(R.T. 32:17-22), to meet the Court's requirements of an expert. This ruling can be construed as impossible to meet by any plaintiff in malpractice. Considering the limited time and geographical area only attorneys practicing at the time in Shasta could meet the test, and considering the interrelationships of such a legal community, no lawyer could be expected to commit "professional suicide" by testifying. The Court was wrong in setting such an impossible test and petitioner is due a new trial.

THE NINTH CIRCUIT COURT OF APPEALS FAILED TO APPLY CONTROLLING STATE LAW TO THE ISSUE OF WHETHER A PLAINTIFF IN A MALPRACTICE ACTION CAN PROVE HIS CASE BY THE TESTIMONY OF DEFENDANT.

The Appellate Court misconstrued the issues raised while citing TRAVERS VS. MESHRIY (627 F.2d. 934, 939-940, 9th Cir. 1980), a case in point to a failure of substantial evidence, however, the substance of the evidence was not before the Court for review.

The exact wording of respondent's Motion for Directed Verdict, made at close of petitioners case as required by F.R.Civ.P-50 (a), is set forth in reporter's transcript at 37:17-25, however, a clear understanding of the exact nature of petitioner's motion and the Court's ruling is set forth in Memorandum and Order issued at time of denial of Motion for New Trial. (Memorandum and Order attached as app. C .) The Court described the procedure, as follows;

(AT THE CLOSE OF PLAINTIFF'S CASE DEFENDANT MOVED FOR A DIRECTED VERDICT UNDER F.R.CIV.P. §50(a), CON-

TENDING THAT THERE WAS NO COMPETENT EVIDENCE OF LIABILITY, AND THEREFORE NO ISSUE OF FACT TO BE SUBMITTED TO THE JURY, BECAUSE THERE WAS NO EXPERT TESTIMONY TENDING TO PROVE (1) THAT DEFENDANT'S CONDUCT FELL BELOW THE APPLICABLE STANDARD OF CARE, OR (2) THAT ANY ALLEGED NEGLIGENCE OF DEFENDANT WAS A PROXIMATE CAUSE OF DAMAGES TO PLAINTIFF. (emphasis in orig.)

The Order makes it clear that the contentions of the respondent was that the evidence was not competent solely because of no expert testimony, and the Court granted the motion as stated. The petitioner now must prove only that his case was in fact made on expert testimony to point up the error of the trial court. The Court is requested to consider the record, as follows:

MR. SARGENT: YOUR HONOR, REGARDLESS OF THE COURT'S RULING THAT THE PROBABILITY OF AN EXPERT WITNESS IS NOT REQUIRED IN THIS CASE, I WOULD MOTION THE COURT FOR A FINDING AT THIS TIME THAT THE PLAINTIFF'S CASE HAS IN FACT BEEN PREDICATED UPON EXPERT TESTIMONY, THAT BEING THE TESTIMONY OF MR. MAYER AND MR. SHERWOOD, BOTH BEING DEEMED EXPERTS. (R.T. 29:5-10)

and,

THE COURT: WHAT IS IT YOU WANT TO MOVE AT THIS TIME?

MR. SARGENT: WELL, I WAS CONTEMPLATING MEETING THE LEGAL REQUIREMENTS THAT THE CASE BE PREDICATED UPON EXPERT TESTIMONY, AND I WAS SUBMITTING THAT THE TESTIMONY OF THE TWO EXPERTS THAT HAVE PREVIOUSLY TESTIFIED, MR. MAYER AND MR. SHERWOOD, WOULD SERVE TO MEET THAT NEED OF THE PLAINTIFF.

THE COURT: YOU ARE ABSOLUTELY CORRECT IT DOESN'T MATTER WHO PRODUCES THE WITNESS IF THE WITNESS' TESTIMONY ESTABLISHES THAT THE STANDARD OF CARE HAS NOT BEEN MET, THE FACT THAT THE WITNESSES WERE CALLED---WELL YOU CALLED MR. MAYER, BUT IT DOESN'T MATTER WHETHER YOU CALLED HIM UNDER CROSS-EXAMINATION OR UNDER DIRECT EXAMINATION,---.(R.T. 30:15-25)

The record shows there to have been only three witnesses to testify. The petitioner, who by law is entitled to every presumption,(BUSINESS DEVELOPEMENT CORP. OF N.C. VS. U.S.,C.A.N.C. 1970, 428 F.2d.451, Cert. Denied 91 S.CT. 355, 400 U.S.957.), along with the respondent Mayer and his expert witness Mr. Sherwood both of whom had been deemed experts for plaintiff. (R.T. 29:5). Controlling law on the issue is clear as set forth in LAWLESS VS. CALA-

WAY (24 Cal.2d. 81), where the Court stated that a plaintiff in a malpractice case can prove any number of material facts, or the whole case, by testimony of the defendant.

Because of the foregoing factual circumstances regarding the evidence established at trial the petitioner submits that the trial court usurped the province of the jury by taking competent and sufficient evidence from the jury and directing a verdict for the respondent. The petitioner was deprived of his rights to due process and should be allowed a new trial.

THE TRIAL COURT'S CONTRADICTORY RULINGS ON EVIDENCE MISLED THE PETITIONER AT TRIAL AND IT'S DISTORTION OF TRIAL RECORD LED THE CIRCUIT COURT OF APPEALS TO ERRONEOUS CONCLUSSIONS.

The supervisory powers of this Court is necessary to restore equity in the proceedings below and in order for the Court to understand the issues involved a recognition of the true chronological sequence of events at trial is necessary. The record shows the true sequence, as follows;

The trial convened on October 7, 1980 and a jury was empaneled on that day. The petititioner, as plaintiff, offered the deposition of his expert witness Gerald Kunes, a Maryland attorney in practice for some twenty-five years. The deposition had been taken "de bene esse" because the trial date had been repeatedly changed and it was uncertain if the witness could appear when ultimately needed. The Court refused the deposition on technical grounds but did not mention the fact that the proposed expert witness was from Maryland.

Petitioner took the stand for a short time to admit documents into evidence. He then called the respondent Mayer to testify as defendant for plaintiff's case. Mr.

Mayer was on the stand during the afternoon session of October 8th and his testimony was interrupted at the beginning of the morning session on October 9th to permit expert witness for the defense, Mr. Sherwood, to testify , out of turn, during the plaintiffs case. After the witness testified for the defense petitioner cross-examined him for the rest of the day and the entire day of October 10th. The Court declared a recess in the trial from October 10th to October 20th to accommodate criminal matters on the calendar the Court said "could not wait."

Trial resumed on October 20th and Mr. Kunes, expert witness for the plaintiff, was called to be qualified. The Court rejected the witness because he did not practice "within the geographical limits of the State of California", as is fully set forth in the first question in this petition.The Court, in the light of it's reason for disqualifying the witness, knew or should have known at the time of rejecting deposition of Mr. Kunes that it would not, in any event, qualify a Maryland attorney as an expert. It owed a duty to the plaintiff to so inform him at the time in order that he could avail himself of the ten day recess in the trial to find an expert that the Court would accept. The prejudice suffered by the petitioner cost him his case.

Upon disqualification of Mr. Kunes the Court proceeded to mislead the petitioner by engaging in an extended discussion of the theory of the case and stating that "in the opinion of the Court" the issues in the case did not require expert testimony for proof. (R.T. 27:3-16) The Court closed the issue, as follows;

> THE COURT:ALL I'M SUGGESTING TO YOU IS THAT IF YOU ESTABLISH BY THE EVIDENCE THAT YOUR LAWYER DIDN'T TELL YOU WHAT THE FACTS OF THE CASE WERE AND WHAT THE ISSUES WERE GOING TO BE, AND THAT YOU WENT INTO TRIAL UNPREPARED WHERE YOU COULD HAVE PRODUCED EVIDENCE, I DON'T THINK YOU NEED AN EXPERT WITNESS.(R.T. 32:5-9).

Regardless of the Court's ruling that the case did not require expert testimony petitioner went to extraordinary lengths to establish that his case was being made on the testimony of the respondent Mayer and his expert witness Sherwood, as outlined in detail in question two herein.

The substance of the evidence, which may or may not be in question here, was made on over one hundred documents that Mayer and his expert were interrogated on for a period of three full days. An example of the conclusiveness of evid-

ence admitted to support plaintiff's case can be seen from an examination of three (3) letters from respondent to petitioner while his legal counsel. The letters are attached hereto as Appendix and the first states that issues in suit against insurance company cannot be tried in the Shasta County, when in fact they were the only issues tried. The second letter was sent to petitioner immediately before the Shasta trial and it advises petitioner that there is nothing to worry about, when in fact the judgement that issued non-suited the petitioner in his action against the insurance company, and the last letter advises petitioner to not oppose pending foreclosure proceedings when the ultimate result was that the petitioner lost his business property.

Petitioner concluded his case on October 21 by taking the stand and testifying on the issue of damages. He then rested his case. Defense moved for a directed verdict and the Court granted the motion. The Court made no written findings pursuant to judgement, however, at disposition of Motion for New Trial a Memorandum and Order was filed. (Memorandum and Order att. as App. C).

The Trial Court's Memorandum and Order establishes with finality that the respondent's Motion for Directed Verdict and the Court's granting of that motion did not go to the substance of the evidence at trial, only that said evidence purportedly had not been established by expert testimony.

The Memorandum and Order goes on to recite an alleged sequence of events that, if true, would justify the Court's findings, however, the recitation is a distortion of the true record as set forth in this petition. First, the Court denies ever assuring the petitioner that he did not need an expert witness for the proof of his case. Prior citations to the record herein respond to that allegation. The Court then describes an alleged sequence of events at trial and makes a statement of facts contrary to the true record. The Court states that it granted petitioner additional time to produce his expert witness at trial and that this required a re-ordering of the proof in the case by the testimony of respondent's expert witness, out of turn, and during the plaintiff's case.

The facts are that petitioner never requested, nor was given, any additional time for any reason, and the ten days

recess in the trial was ordered by the Court because of the Court's own scheduling problems with criminal matters that must be heard. (R.T.14:21 and 18:8-15). As to the reordering of proof being the petitioners fault, the record is, as follows;

> THE COURT: LADIES AND GENTLEMEN, ALTHOUGH THE PLAINTIFF HAS NOT CONCLUDED HIS CASE, THE ORDINARY ORDER OF PROOF AT TRIAL IS PLAINTIFF PUTS ON ALL HIS CASE, THEN THE DEFENDANT STARTS THE DEFENSE, IN THIS CASE, IN ORDER TO ACCOMMODATE A WITNESS, COUNSEL HAVE AGREED AND THE COURT HAS AGREED THAT A DEFENSE WITNESS MAY BE PUT ON TODAY OUT OF ORDER, ACTUALLY, DURING THE PLAINTIFF'S CASE,(R.T. 12:2-11).

The Memorandum goes on to juxtapose events at trial in a manner inconsistent with the record, but if taken to be the true order, it would tend to justify the Court's actions. The Memorandum and Order does not address the question of Mayer and Sherwoods testimony, in fact the Court proceeds as if no such testimony was ever made and denied petitioner's Motion for New Trial.

Petitioner suggests the Trial Court's Memorandum and Order were taken at face value by the Ninth Circuit Court of

Appeals and thereby a gross miscarrage of justice was perpetuated. This Court Should impose it's supervisory powers to rectify the inequities created and grant the petitioner a reversal of the judgement or, alternatively, a new trial.

CONCLUSION

For the reasons set forth herein the Petitioner respectfully submits that a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK R. SARGENT,
Petitioner pro se

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed on this date , postage prepaid, to the parties as named below.

Frank R. Sargent
Petitioner pro se

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Filed Feb. 26, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK R. SARGENT, Plaintiff-Appellant vs. MARSHALL S. MAYER, Defendant-Appellee.	No. 81-4020 D.C. No. Cv-S-78-50 MEMORANDUM

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
HONORABLE MILTON L. SCHWARTZ, DISTRICT JUDGE PRESIDING-ARGUED AND SUBMITTED FEB. 12, 1982
BEFORE:Farris, Ferguson and Nelson Cir.Judges

Plaintiff-appellant, Frank R. Sargent (Sargent), appeals to this court from the denial of his motion for summary judgement and from a directed verdict entered for the defendant-appellee, Marshall S. Mayer(Mayer).

Sargent contends that Mayer did not comply with procedural requirements in opposing his motion for summary judgement and therefore the motion should have been granted in his favor under FRCiv P 56(c). His contention need not be reached because even when no evidence is presented in opposition to the motion, summary judgement should not be granted if evidence in support of the motion

is insufficient. Hoover v. Switlik Parachute Co. 663 F.2d. 964, 967 (9th Cir. 1981). For the reasons stated by the district judge, the evidence presented in support of the motion for summary judgement was insufficient.

In reviewing the granting of a motion for directed verdict on appeal the test is: viewing the evidence as a whole, and in the light most favorable to the nonmovant, whether there is substantial evidence present that could support a finding, by reasonable jurors for the non-moving party. Travers v. Meshriy, 627 F.2d 934, 939-940 (9th Cir.1980) Substantial evidence was not presented here. The directed verdict was granted based on Sargent's failure to produce the expert testimony necessary to establish his prima facia case of attorney malpractice. The transcript of the trial court reveals a vigorous attempt by the trial judge to help Sargent, who appeared in propria persona, understand applicable California law and it's requirements for the proper presentation of his case of attorney malpractice. The arguments presented by Sargent on appeal are founded on a misunderstanding of the applicable law, misintrepretation of the trial court's holdings, and evidence unsupported by the record.

Sargent provides no basis for a reversal of the denial of his motion for summary judgement or the grant of defendant's motion for a directed verdict. Therefore, the district court's decision is affirmed.

Filed 4-20-82

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK R. SARGENT, Plaintiff-appellant, vs. MARSHALL S. MAYER, Defendant-Appellee.	No. 81-4020 D.C.No.Civ-S-78-50 ORDER

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
BEFORE: FARRIS, FERGUSON & NELSON Cir.Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Farris, Ferguson and Nelson have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

FRANK R. SARGENT, Plaintiff, vs. MARSHALL Y. MAYER, Defendant.	CIV.NO.S-78-50-MLS

MEMORANDUM AND ORDER

This case was tried to a jury, commencing October 7, 1980, with Plaintiff, Frank R. Sargent, appearing in propria persona. Defendant was represented by Douglas E. Newlan of Barr, Minoletti & Newlan.

At the close of plaintiff's case, defendant moved for a directed verdict under FRCivP § 50 (a), contending that there was no competent evidence of liability, and therefore no issue of fact to be submitted to the jury, because there was no expert testimony tending to prove (1) that defendant's conduct fell below the applicable standard of care, or (2) that any alleged negligence of defendant was a proximate cause of damage to plaintiff. Defendant submitted a memorandum of points and

authorities in support of his motion, and the motion was thereafter orally argued by both sides, following which the court, on October 21, 1980, granted defendant's motion for directed verdict.

On November 10, 1980, plaintiff filed a written notice of motion and motion for an order granting a new trial, accompanied by a combined declaration-memorandum of points and authorities. The motion was argued orally on December 19, 1980, and submitted.

Judgement for defendant, pursuant to the order granting motion for directed verdict, was entered on November 21, 1980.

The court has examined the various assignments of error asserted by plaintiff and concludes that there is only one ground which merits serious consideration, namely, plaintiff's contention that he was misled by the court into beleiving that he could legally prove his case, to the point where it could be submitted to the jury, without establishing by expert testimony the elements of negligence and proximate cause.

Plaintiff has complied with the technical requirements of FRCivP § 59. The motion was made in writing and served within ten days after the entry of judgement; in fact, it was made prior to entry, but

the law is clear that this does not render the motion premature so long as it was made after announcement of the court's decision. The ground for the motion are stated therein with reasonable clarity and particularity, keeping in mind that the plaintiff is not represented by counsel. Finally, the ground which the court considers worthy of consideration is one which is recognized by Rule 59 (and the prior case law which it incorporates) and which can be characterized under the general heading of " improper comments by the trial judge."

The court has carefully examined the recordand the trial transcript in an effort to determine whether any comments made by the court could reasonably have misled plaintiff into believing that it was unnecessary for him to obtain the services of a properly qualified expert witness to testify on the issues of negligence and proximate cause, and has concluded that the only statements which could remotely be claimed to have misled him are the following remarks which were made by the court in connection with it's ruling that the Maryland attorney proffered by plaintiff as his expert witness was not qualified to testify as an expert on California law practice and procedure in the Shasta County area:

"Well, Mr. Sargent, after cutting you off from your initial statement to me this morning if you think this is a matter that could be decided by non-expert witnesses, I have come around full cycle to thinking that maybe you are right. As I understand the witness, as well as your position, he's saying that Mr. Mayer failed to tell you certain things, and if he had told you those things, then you could have---you would have done other things. That doesn't need an expert witness. I agree with you that hypothetically it doesn't take any specialized standard of care to know that a lawyer is required to keep his client advised where the client needs to make decisions and where decisions have to be made on the defense of his case. I don't think it calls for expert testimony, if that's the basis."

Rptr. Transcript of trial proceedings Monday, October 20, 1980 at 10:05 a.m.

The difficulty, however, with plaintiff's argument is that these comments must be viewed in the chronological sequence in which they were made. To begin with, plaintiff first offered the expert testimony of the Maryland attorney, Mr. Kunes, by way

of his deposition. The court sustained the objection to such deposition testimony on the ground that the questions on voir dire examination of Mr. Kunes at the deposition failed to establish whether he was or was not qualified as an expert on the subjects about which he testified. The court, therefore, granted additional time to plaintiff to arrange for Mr. Kunes presence at the trial on a later date, which, in turn, required a re-ordering of the proof and resulted in defense testimony being introduced outof order, with Mr. Kunes thereafter being called as part of plaintiff's case in chief after the introduction of certain defense testimony.

When Mr. Kunes finally appeared in court he was questioned extensively, out of the presence of the jury, on his qualifications, with the court assisting plaintiff in this voir dire examination. At the conclussion of the questioning, and still outside the presence of the jury, the court ruled that the witness could not qualify as an expert in the areas about which he proposed to testify, and in connection with the announcement of such ruling the court made the above quoted remarks.

Plaintiff contends that when the court made it's ruling precluding the introduction of Mr. Kunes testimony, plaintiff would have

then sought the services of a properly qualified expert on California law and procedure but was misled by the court into believing that such expert testimony was not necessary. Assuming that plaintiff was in fact so misled, he fails to explain (1) where he would have located such an expert witness, and (2) how any such witness could have been expected to review and analyze an extensive, complex background file so as to be prepared to testify, without a substantial continuance of the trial---which the court would not have granted in light of the fact that the jury had been in attendance since October 7, 1980, with one interruption already, between October 10 and October 20.

The court concludes, therefore, that even if it had not made the remarks quoted above, and if plaintiff, on October 20, 1980, had requested a continuance to permit him t o seek to obtain an expert witness, the court would have denied such request as untimely and would have required plaintiff to proceed with the balance of his case at that time, which would have produced the same result as actually obtained. The fact that plaintiff might have been able to find a properly qualified expert witness who would testify to facts sufficient to discharge

plaintiff's burden of proof, or at least sufficient to permit the case to go to the jury, is entirely speculative and would not have warranted a substantial interruption of the trial in order to permit plaintiff to conduct his search at that late date.

In light of the foregoing, the court concludes that plaintiff suffered no prejudice by reason of what he classifies as improper or misleading comments by the court, and therefore the court DENIES PLAINTIFF'S MOTION FOR A NEW TRIAL.

DATED: December 30, 1980

/S/ Milton L. Schwartz
UNITED STATES DISTRICT JUDGE

APPENDIX D

May 30, 1974

Mr. Frank R. Sargent
200 Main Street
Laurel, Md. 20810

re:Sargent v. Patel

Dear Frank,

This case appears to be directly on point and it is my feeling that we should do nothing at this point to further preclude the holder of the Trust Deed which is in default from foreclosing.

Please give me any thoughts that you may have.

Sincerely,

/S/ Marshall S. Mayer

(Plaintiff's exhibit #17, 5-9-78)

August 11, 1975

Mr. Frank R. Sargent
Tax Accountant
200 Main Street
Laurel, Md. 02810

Dear Frank,

DepartmentIII of the Superior Court, Honorable Clyde Small presiding held a pre-trial conference August 8, 1975 in the inter-pleader action filed by Great American Insurance Company. The conference lasted three hours and wound up probally more confusion than clarity, as to what the issues are.

This case is going to be tried, at least in court on October 31, 1975. It will not be necessary for you to be personally present since all questions involved are legal issues. There is no factual dispute as to the fact of the insurance, the amount available under the terms of the policy and who the loss payees are under the policy.

The principal problems that are now present involve the fact that at the time of the loss Gigraltar Savings and Loan had a policy in effect with the Hartford company and this may or may not be available as an offset. In addition, the fact that the United ates Government is involved since they are interested in any proceeds you may have, appears to have a beneficial effect. In fact, It may be possible that the Corradettis will offer to settle with Federal government to remove them from the case, since the Federal Governments rights to get at the proceeds may be greater than any of the other parties under the terms of Federal Law. If the Federal Government were to receive funds from the Corradettis this would reduce your tax liability, which I am sure would be of benefit to you.

(plaintiff's exhibit no. 70 S-78-50)

I have made sure that the issues involved in your lawsuit against Great American in San Francisco will not be adversly affected by any proceedings that we take here in Shasta County. I think that it would be advisable for you to move that matter along because at the present time I understand that the attorney for Mr. Sweigle has intervened and if you fail to take action he can move the matter without your consent.

If you have any questions please drop me a line.

Sincerely,

/S/Marshall S. Mayer